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No. 97.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

MACARTHUR BROTHERS COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

On September 23, 1910, the MacArthur Brothers Company entered into a contract with the United States for certain excavation and construction work in connection with a new canal at Sault Ste. Marie, Michigan, under the direction of the Chief of Engineers of the United States Army as authorized by the River and Harbor Act of March 2, 1907, ch. 2509, 34 Stat. 1073, 1098.

The particular part of the work out of which appellant's claim arises is that relating to the excavation of an area of the "new construction canal" which was to be done "in the dry." In order to do the excavating in the dry it was necessary to erect

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cofferdams, and this was expressly provided for by paragraph 23 of the specifications. R. 12.

In proceeding to perform that work the MacArthur Company sought to make use of a certain pier, called "old North West Pier," as a part of one of the cofferdams. When, however, an attempt was made to drain or pump the water from the area to be excavated, it was discovered that the pier was so constructed as not to be sufficiently tight to prevent a heavy inflow of water into the cofferdam and by reason of this the work of excavating was, according to the company's claim, much more expensive than expected. It therefore brought suit in the Court of Claims to recover $366,052.67, the amount alleged to have been expended because of these unexpected conditions.

The theory of the petition appears to be that there was misrepresentation on the part of the Government with respect to existing conditions. Two misrepresentations are averred: one, that by specifying the excavating should be done in the dry, the United States represented that such work could be done in that manner; the other, that the letting of the contract for construction of the "old North West Pier" was a representation that it would be erected according to the specifications. It is then averred that the company in submitting its bid and entering into the contract relied upon those specifications being adhered to and figured upon the availability of the pier for cofferdam purposes; that the pier was not constructed as specified and as a result the addi-

tional expenditure was necessary to perform its contract.

To the petition, which has been twice amended, a demurrer was interposed (R. 44) on the grounds that a cause of action was not stated and that the court was without jurisdiction. The demurrer was sustained and the petition dismissed (R. 47); opinion, R. 44–47. From that judgment the company appealed to this court.

PROPOSITIONS.

I. There was no misrepresentation on the part of the United States.

II. Were there misrepresentation, that is not available to appellant since it investigated conditions before entering into the contract.

III. There was no misrepresentation as to the method in which the excavating could be done.

I.

There was no misrepresentation on the part of the United States.

It appears from a reading of appellant's brief that it has practically abandoned the contention made by it in the Court of Claims that the Government was guilty of misrepresentation in that the old North West pier was not constructed according to specifications. It now relies upon the proposition that as the specifications for the excavating work required it to be done in the dry, that was a representation the work could be done in this manner,

while the contrary was the fact. However, as there seems to be a half-hearted attempt to still cling to the first contention, we deem it proper to treat the case as presenting both.

First, then, as to the construction of the pier. It is important to note that neither the specifications nor the contract with the MacArthur Company made any reference to the old North West pier. It should also be borne in mind that the contract for the old North West pier was entered into more than two years prior to the time when the MacArthur Company entered into its contract, at which time the work of erecting the pier was not completed, though being prosecuted. But appellant asserts that it knew what the specifications called for with respect to the construction of the pier; that by letting the contract under those specifications the United States represented that the pier would be thus constructed; that the company had a right to assume that the pier would match the specifications, and that because it did not, the United States is chargeable with misrepresentation.

Now assuming that the specifications concerning the pier were a representation, they would not be such a representation as would afford appellant any cause of action, for the very good reason that they were issued more than two years prior to the time when appellant entered into its contract; they were not made a part of appellant's contract, there was no reference to them; nor were they issued to induce

appellant's contract, but on the contrary related to an entirely different one.

Of course to be availed of, a misrepresentation must be made at the time of the contract for the purpose of inducing its making and as a part of the transaction. *Slaughter* v. *Gerson*, 13 Wall. 379, 383; *Dawe* v. *Morris*, 149 Mass. 188, 192. None of these conditions obtain as to the specifications for the pier.

Again, the pier specifications, if a representation, were no more than a representation or declaration of intention. The United States did not guarantee that the pier would be constructed accordingly, and certainly it owed no duty to one not connected with that particular work either to complete the pier or to complete it according to specifications. Furthermore, the United States was constructing a pier, not a cofferdam. If the structure when completed suited the Government as a pier, it was of no concern to anyone else how it was constructed.

A false representation must be of an existing fact. A promissory statement will not give rise to a cause of action. *Sawyer* v. *Prickett*, 19 Wall. 146, 160; *Dawe* v. *Morris*, *supra*; *Farwell* v. *Colonial Trust Co.*, 147 Fed. 480, 483; *McGovern* v. *McClintic-Marshall Co.*, 269 Fed. 911, 914.

It is said that because the map or plan (Drawing No. 301, R. 48 *et seq.*) had a notation "Center Pier may be sheathed with plank with a clay toe to serve as cofferdam," that was a representation that the pier was suitable for such purpose. It is going a long way to convert a permission thus granted into

a representation. No statement was made that the pier would be of any particular construction or would be found practicable for cofferdam purposes. It amounted to no more than a license or permit to make use of the pier; it was not made mandatory upon the contractor; he could use it or not as he thought advisable; but if he used it he took it as he found it.

II.

Were there misrepresentation, that is not available to appellant since it investigated conditions before entering into the contract.

But we go a step farther and contend that if misrepresentations were shown which would *otherwise* be available to appellant, its contract and its conduct estop it from asserting them. Section 7 of the specifications (R. 8) declared:

> It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

Section 19 (R. 10) had this statement:

> It is expected that each bidder will, prior to submitting his bid, visit the site of the work, examine the local conditions, inform himself as to the accessibility of the work, ascertain the character of the material to be

> excavated, consult the plans on file at the U. S. Engineer Office at Sault Ste. Marie, Mich., and obtain such available information as will assist him to make an intelligent bid, and the failure of a bidder to make such examination may be held to be sufficient reason for rejecting his bid.

Section 22 (R. 11, 12) required the contractor to construct and maintain all necessary cofferdams, furnish suitable and adequate pumping plants and do all the pumping required to unwater all areas where work was to be done in the dry, and no special payment was to be made therefor.

Section 62 (R. 30) provided that the contractor should not take advantage of any errors, ambiguity or omission of details in specifications or drawings, but must do everything which might be necessary to carry out the contract in good faith. This contemplated all work necessary to secure the results described.

In its proposal appellant made this statement (R. 32):

> We make this proposal with a full knowledge of the kind, quantity and quality of the plant, work and material required.

Section 8 of the contract (R. 34) reads thus:

> No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bar-

> gained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

In the face of all these terms and conditions it can not be hopefully contended that appellant in entering into this contract and performing what was required thereunder did not assume the task with full knowledge of the conditions and with the distinct understanding that whatever developments occurred, at least in so far as the work of excavation was concerned, the United States was not to be liable except upon the terms stated in the contract.

Furthermore, the petition alleges that appellant made all reasonable inquiries and investigation upon the site of the contract prior to entering into the same, and that the president and chief engineer of the company personally inspected the conditions (R. 40). But if a careful investigation had been made it is reasonable to suppose that conditions would have then been found which would have indicated that the pier construction was not proceeding according to specifications. There is no allegation as to how extensive an investigation was made, merely a conclusion being stated—"all reasonable inquiries and investigations."

Having had and exercised the privilege of making an examination of the project appellant can not now be heard to complain because its experts failed

properly to estimate the difficulties or to examine the construction work of the pier then being built. *Southern Development Co.* v. *Silva*, 125 U. S. 247, 259; *Farrar* v. *Churchill*, 135 U. S. 609, 616; *Farnsworth* v. *Duffner*, 142 U. S. 43, 47, 48; *Shappirio* v. *Goldberg*, 192 U. S. 232, 241, 242.

III.

There was no misrepresentation as to the method in which the excavating could be done.

We can not see much force in the main assertion now put forward that the Government represented that the work could be done in the dry because it required it to be done in that manner. This contention is hooked up with the pier construction proposition, for it is said that the Government knew how the pier was being constructed and therefore knew it could not be used as a cofferdam or a part of one; and therefore it knew the area could not be made dry and that the work could not be done in the dry.

We content ourselves with two answers to that: one, there was no showing that appellant could not have constructed a cofferdam without using the pier; and two, *it did the work in the dry* and thus demonstrated that it could be done. The petition plainly shows that the averment of impossibility of doing the excavating in the dry is based upon the alleged unavailability of the pier as a cofferdam. There is no assertion that the area could not be unwatered otherwise and without using the pier. The petition avers (R. 42):

> When it became clearly apparent that it was impossible to make the floor of the area

> dry and to make the excavation in the dry as it was represented by the specifications of the claimant's contract that it was to be done, owing to the excessive leakage of water through the faulty construction of the old North West Pier by another contractor, as aforesaid, the claimant asked leave of the engineer in charge of said work on the part of the United States to take out the material by dredges in the wet, the method properly applicable to excavation of this character which could be done only under wet conditions. Said engineer in charge of the work of the United States would not allow the claimant to do the work in that manner, *but required him to do the work by dry methods, to wit, by steam shovels operating on tracks*, but always under conditions of so much water as to make the operation of such steam shovels and other methods applicable to dry excavation more expensive than if the work was, or could be, actually done in the dry. [Italics ours.]

The petition defined removal of materials in the dry as meaning "removal by means of a steam shovel or similar appliance which required the removal of water to an extent which will permit the laying of tracks and operation of cars and locomotives or similar means of transporting the materials on the canal bottom". R. 41. It is clear, therefore, that the work was done in the dry and what appellant really complains of is that such work was more expensive than it had estimated. This, however, does nor entitle it to additional compensation. *Day* v. *United States*, 245 U. S. 159, 161.

Plainly, what appellant seeks is to have the United States pay for the error of judgment on its part. It supposed the pier could be used as a cofferdam. It supposed that because it supposed the pier had been constructed according to specifications. It guessed wrong, therefore the United States should pay. If the Government is to respond in this case, it must make good every contractor's mistakes, and a cause of action against it will arise out of a mistaken impression or false supposition.

We think the whole case is summed up in this naive allegation in appellant's petition (R. 40):

> It was the expectation of the claimant that by constructing the west cofferdam and sheathing the face of the old North West Pier he would then be able with a reasonable amount of pumping machinery to pump out the enclosure and remove the Class "B" excavation in the dry.

CONCLUSION.

The Court of Claims rightly disposed of the case and its judgment should be affirmed.

Respectfully submitted.

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OCTOBER, 1921.